

WILLIAM J. FELIX

IBLA 88-675

Decided April 11, 1990

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying a motion to dismiss contest proceeding and rejecting Native allotment application F-18825.

Affirmed in part, set aside in part, and remanded.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Generally--Contests and Protests: Generally--Rules of Practice: Private Contests

A timely filed state protest of a Native allotment pursuant to ANILCA, sec. 905, prevents legislative approval of the allotment from taking effect.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Contests and Protests: Generally--Rules of Practice: Protests

Where legislative approval of a Native allotment was prevented by timely and effective state protest, adjudication of the ensuing contest proceeding must conform to regulations governing contests without further application of provisions of ANILCA.

3. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Contests and Protests: Generally--Rules of Practice: Protests

An extension of time to file an answer is permitted under Departmental regulations governing contest procedure. Where application for extension of time to answer contest complaint was timely filed with BLM by a Native allotment applicant, it was error to fail to consider and grant the request which was made in conjunction with a motion to dismiss.

APPEARANCES: Judith K. Bush, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for appellant; Judith A. Hogenson, Esq., Office of the Attorney General, Fairbanks, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

William J. Felix appeals from an August 16, 1988, decision of the Alaska State Office, Bureau of Land Management (BLM), denying his motion to dismiss a private contest against his allotment application F-18825 filed by the State of Alaska Department of Transportation and Public Facilities. The same decision also rejected his application for Native allotment F-18825.

Earlier, on October 27, 1987, BLM had approved Felix's Native allotment application. In that decision, BLM found that on May 16, 1972, the Bureau of Indian Affairs (BIA) filed Native allotment application F-18825 on behalf of Felix and that sufficient evidence of use and occupancy of the allotment had been shown to satisfy provisions of the Native Allotment Act of 1906, 43 U.S.C. § 270-1 (1982), repealed with a savings provision by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1982). The allotment application, which was pending before the Department on December 18, 1971, claimed use and occupancy since June 1, 1960, of approximately 160 acres of unsurveyed land located in sec. 11, T. 10 N., R. 16 E., Fairbanks Meridian.

Quoting section 905(a)(5) of the Alaska National Interest Lands Conservation Act (ANILCA) of December 2, 1980, 43 U.S.C. § 1634 (1982), the October 27, 1987, decision determined that Felix's "application cannot be legislatively approved and must be adjudicated because on June 1, 1981, a valid protest was filed by the State of Alaska under the criteria set forth in [ANILCA section 905(a)(5)(B)]." That statute, which became law on December 2, 1980, provided for approval of all Native allotment applications pending before the Department on the 180th day following enactment of the statute, except where, so far as pertinent here, there was a timely protest. In that case, any protested allotment protested would be adjudicated pursuant to the 1906 Native Allotment Act. Id.

The State protest against the Felix allotment application was valid, BLM found, because it correctly recited that an existing highway, the Steese Highway, crossed the allotment. Because Felix claimed use and occupancy from June 1, 1960, and the highway right-of-way had been quitclaimed to the State on June 30, 1959, BLM determined that a certificate of allotment would be issued to Felix subject to the continued right of public access for the Steese Highway. The state's asserted right to access across Felix's allotment for a boat launch on a creek running through the allotment was rejected, however, because field examination of the allotment revealed that the boat launch was located a mile east of the allotment.

Finally, the October 27, 1987, decision canceled BLM material site F-026313, gravel pit No. 38 for the Steese Highway, which had been granted to the State, subject to valid existing rights. BLM found that this grant, made on October 21, 1960, was subordinate to the prior Felix claim, which dated from June 1, 1960.

On December 17, 1987, within the time established by the October 21, 1987, decision for initiation of a private contest, the State filed a private contest complaint but failed to include payment of required fees.

BLM found that, as a result, the complaint was not filed timely, and dismissed the contest. Appeal was taken to this Board, which, in a March 31, 1988, decision, IBLA 88-223, dismissed the State's appeal for failure to file a statement of reasons (SOR), but nonetheless held:

However, we stress that the dismissal of this appeal is without prejudice to BLM's considering the State's contest complaint. We do not regard the failure to timely submit the filing fee required by 43 CFR 4.450-4(d) as fatal to the validity of the contest once the deficiency has been cured. The private contest regulations, 43 CFR 4.450-1 through 4.450-8, establish no time deadline for filing and do not specify that an untimely contest complaint must be dismissed. Compare 43 CFR 4.411, 4.1151, 4.1160, 4.1270 and 4.1271 (each providing that failure to timely file a document initiating an administrative review proceeding mandates dismissal of the proceeding). Although 43 CFR 4.450-4(d) does specify that a contest complaint which is not accompanied by the required filing fee and deposit will not be accepted for filing, this provision, when viewed in historical perspective, should not be treated as barring an otherwise timely contest complaint for failure to file the fee.

BLM was instructed to treat the contest complaint as timely filed. On April 20, 1988, in conformity to our order, BLM directed Felix to file an answer to the contest complaint subject to the limitation that if "an answer is not filed as required within 30 days of receipt of this notice, the allegations of the complaint will be taken as admitted by the contestee and the case will be decided without a hearing" (Notice dated Apr. 20, 1988; emphasis in original).

On May 26, 1988, 30 days after receipt of BLM's notice, Felix mailed a "Motion And Memorandum To Dismiss Contest," which was filed with BLM on May 27, 1988, and which sought, alternatively, dismissal of the State's contest or extension of time in which to file an answer. After numerous briefs were filed by the parties concerning the effect of this filing, on August 16, 1988, BLM issued the decision here under review. The motion to dismiss was denied by BLM's decision, and a motion by the State to treat the contest complaint as admitted was granted. The application by Felix for an extension of time to answer was not dealt with by the August 16 decision, but Felix's Native allotment application was rejected.

On appeal to this Board, Felix contends that BLM erred when it denied his motion to dismiss the State contest, because the principal issue sought to be raised by the contest concerns gravel pit No. 38, a BLM right-of-way not listed in the State's protest among the claimed rights of access to the Felix allotment. Citing State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14 (1985), and ANILCA, section 905(a)(5)(B), Felix argues that the State's contest is defective because the claimed right upon which it rests, the material site, was not included in the protest so as to satisfy the ANILCA requirement that a State protest of a Native allotment "include with specificity the facts * * * concerning access" (SOR at 3). Alternatively,

the SOR argues that, even if the contest complaint can withstand a motion to dismiss on the stated ground, the allotment application by Felix must be adjudicated on its merits pursuant to the 1906 Native Allotment Act.

The State, citing Sainberg v. Morton, 363 F. Supp. 1259 (D. Arizona 1973), aff'g United States v. Sainberg, 5 IBLA 270 (1972), contends that the failure to timely file an answer requires that the contest complaint be taken as admitted. Consequently, this argument continues, rejection of the application is required in conformity to Departmental regulations governing contest proceedings which require that the complaint's allegations be deemed admitted.

[1] Neither party has challenged the finding by BLM in the decision issued October 27, 1987, that ANILCA, section 905(a)(5)(B) required, under the circumstances of this case, that the Felix allotment application be adjudicated pursuant to the 1906 Native Allotment Act because the land claimed was crossed by the Steese Highway. A timely filed State protest claiming access rights under ANILCA, section 905(a)(5)(B) precludes legislative approval of the allotment under ANILCA. State of Alaska, (Elliot R. Lind) On Reconsideration, 104 IBLA 12 (1987). This leaves adjudication of the affected allotment application to previously established procedures developed by Departmental regulation for implementation of the 1906 Native Allotment Act. Stephen Northway, 96 IBLA 301 (1987); cf. Eugene M. Witt, 90 IBLA 330 (1986) (giving similar effect to ANILCA, section 905(a)(5)(C)). Since there is no question that the State protest was effective to require adjudication of the Felix allotment insofar as concerned the highway access claimed by the State, it is clear that the Felix allotment was not legislatively approved on the 180th day following approval of ANILCA, and that such approval is no longer possible. Id.

[2] To establish that it has standing to bring the contest, the State alleges ownership of Steese Highway Pit 38, BLM right-of-way F-026313, located on part of the land also claimed by Felix. Such claim of right is sufficient to establish standing to bring a contest under previously developed administrative rules respecting such actions. State of Alaska, (Elliot R. Lind) On Reconsideration, supra; State of Alaska, 95 IBLA 196 (1987). Once the need to adjudicate an allotment has been established so as to take the allotment out of the operation of the automatic approval provision of ANILCA, the allotment proceeds to adjudication under Departmental rules affecting such matters in the regular course of administration. Stephen Northway, supra. The allotment is subject to scrutiny for any reason which may be made to appear, therefore, in the ordinary course of such adjudications, including a claim that the allotment was not filed timely with the Department, that it was never used or occupied as required by the 1906 Act, or that other uses preceded the Native use and take precedence over the Native claim. 43 CFR 4.450-1. In this case, the State has raised all these issues in the contest complaint, and alleges the yet-to-be adjudicated question of a continuing right to access to gravel pit No. 38. We conclude, therefore, that the motion to dismiss the contest complaint was properly denied.

[3] Under Departmental regulations, the party contesting the allotment may seek adjudication of "title to or an interest in such land." 43 CFR 4.450-1. The contestant "may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of [BLM]." *Id.* The State has done so. This brings us to the question raised when Felix responded to the contest complaint with a motion to dismiss, instead of answering the complaint within 30 days of receipt of notice as required by the BLM decision of April 20, 1988.

There is nothing in the case file to establish when Felix received the notice requiring answer except his own statement concerning the matter. Counting from that date, his motion to dismiss the contest was mailed on the 30th day following receipt of notice, and was received by BLM on the next day. Had the document filed been an answer instead of a motion to dismiss, it would have been timely filed within the provision of 43 CFR 4.401(a), which provides, pertinently:

Whenever a document is required * * * to be filed within a certain time and it is not received in the proper office during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed.

Because, however, Felix had not filed an answer within the time allowed by BLM, the contest complaint was taken as admitted after BLM denied the motion to dismiss, because, at that point, there was no answer to the complaint and the 30-day period to answer had expired. The decision does not rule on the Felix request for an extension of time to answer if his motion to dismiss is denied, but recites that the "effect of the contestee's failure to file such answer is that the 'allegations of the complaint will be taken as admitted by the contestee and the manager will decide the case without a hearing'" (Decision at 2). This action reveals two findings by BLM.

The first finding is that the motion to dismiss was timely filed and entitled to consideration. It was considered on its merits, but denied, correctly as we have found, because the State was found to have standing to bring a contest. The BLM decision of August 16, 1988, was necessarily founded upon an application of the grace-period regulation to the motion. The motion to dismiss would not otherwise have been considered on its merits. It was only because the motion was not incorporated into an answer directly responding to the contest complaint that the complaint was deemed to have been admitted by the manner of pleading adopted by Felix.

This second conclusion by BLM was not correct, however, and was not required by Departmental regulations respecting contest procedures in such cases. Nothing in the regulations governing contest procedures or appeals in such cases prohibits extensions of time to answer in a case where there has been a timely application for such an allowance. Concerning the requirement to file documents in proceedings before the Department generally, only

the failure to timely file a notice of appeal is jurisdictional in the sense there can be no extension of time granted for such filing. 43 CFR 4.411(c). In that case, the cited regulation provides directly that "[n]o extension of time will be granted for filing the notice of appeal." Failure to timely file a notice of appeal requires dismissal. Id.

It is reasonable to conclude, therefore, that the time for filing other documents may be extended for sufficient reason, unless a prohibition against such extension is provided in the applicable regulations. Indeed, the regulations so provide. 43 CFR 4.22(f). No prohibition against allowance of an extension appears in the contest regulations.

While extensions of time are not provided for directly by the contest regulations, amendment of an answer is permitted. 43 CFR 4.450-8. Moreover, extensions of time are generally favored, as explained at 43 CFR Subpart B, which provides that "[t]he time for filing or serving any document may be extended by the Appeals Board or other officer before whom the proceeding is pending, except for the time for filing a notice of appeal and except where such extension is contrary to law or regulation." 43 CFR 4.22(f). An extension of time to file an answer to the contest complaint was therefore permissible.

There was no ruling made by BLM on the Felix request that, if his motion to dismiss were denied, he be allowed an extension of time to answer. Citing Sainberg v. Morton, *supra*, BLM found that it had no authority but to assume that the contest complaint was admitted and cancelled the Felix allotment. The Sainberg decision did not, however, require so limited an application of Departmental rules governing answers to contest complaints.

In Sainberg there had been a late filed answer to a contest complaint. Neither the Board decision nor the District Court opinion considered whether the grace-period regulation might have been effective in that case. There was no question in Sainberg whether there had been a timely filing of the answer, nor was there a request for extension of time. Neither Sainberg decision discusses the manner in which the answer was delivered to BLM, so it cannot be said, in that case, whether the mail was used or not, nor when the answer was, in the words of the grace-period regulation, "transmitted." The case is not, therefore, authority for the proposition that an extension of time may not be allowed to file an answer when a time has been provided for such filing.

Nor can Sainberg be relied upon as authority for the proposition that the grace period allowed by Departmental regulation has no application to cases involving contests: by its terms, the grace-period regulation at 43 CFR 4.401(a) now applies to the filing of documents in contest proceedings generally. It was therefore error for BLM to refuse to consider the request for extension of time to answer which Felix had filed within the 30-day period allowed by BLM. Id.

Under the circumstances of this case, BLM should have granted the request for extension of time to answer. As Felix points out in his reply, the Department favors resolution of disputes on the merits and seeks to

avoid technical dispositions where possible. James C. Mackey, 96 IBLA 356, 94 I.D. 132 (1987). Moreover, in dealing with Native applicants, the Department has been admonished that it should "introduce some flexibility into other apparently rigid filing requirements." Pence v. Andrus, 586 F.2d 733, 743 (9th Cir. 1978). We find that this application for extension of time merits such consideration.

The Felix allotment application was previously adjudicated by BLM on the merits and found to warrant approval. See decision dated Oct. 21, 1987, at 2. This circumstance indicates that the application was not considered without merit, and that the allottee's arguments why the 1987 decision was correct should have been entertained, especially since he was actively pursuing his claim that his allotment was valid when his motion to dismiss the State complaint was denied. Moreover, as our decision in James C. Mackey, *supra*, indicates, there are good reasons to avoid procedural dismissals where there is no showing that a procedural deficiency has prejudiced an adverse party. This reason was the foundation for the prior order issued in this appeal which breathed new life into the prosecution of the State contest action, even though the State had neglected to pay the required filing fee to entitle the contest complaint to be received by BLM. It would be incongruous, given the circumstances of this appeal, to dismiss Felix's claim for procedural reasons after so scrupulously avoiding that result for the State's benefit. We therefore direct that the motion by Felix for an extension of time should be granted by BLM, in furtherance of the policy of flexibility described in Pence v. Andrus, *supra*. In view of some comments made by Felix in the course of this appeal, however, the nature of the answer to be filed should be briefly addressed.

Felix is not correct when he contends in his reply that a simple general denial is implicit in his motion to dismiss. His motion sought to avoid a decision on the merits; had it been granted, no hearing would have been required. The Departmental rule establishing standards for an answer in a contest requires that such a document be "an answer specifically meeting and responding to the allegations of the complaint." 43 CFR 4.450-6. And see Pence v. Andrus, *supra* at 741. If an answer is filed by Felix, it must conform to the requirements set by regulation, which incorporate the requirements described in the Pence decision.

On the record before us it is apparent that the allotment applicant now seeks to challenge the State position on the merits. His attempt to dispose of State opposition by procedural arguments have been rejected. Under the circumstances of this case, we have found that an opportunity to answer should not be denied. Therefore, so much of the decision of August 16, 1988, as rejected the allotment application is set aside, the motion for extension of time to file an answer is granted, and Felix is ordered to file an answer to the contest complaint within 30 days of the date of receipt of this decision. If an answer is timely filed, the contest shall be referred to an Administrative Law Judge pursuant to provision of 43 CFR 4.450-7(b).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision to deny

Felix's motion to dismiss is affirmed, but the decision to reject his allotment application is set aside and the case file is remanded to BLM for further proceedings on the contest consistent with this decision.

Franklin D. Arness
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

